

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT**

CORPORATE EXPRESS OFFICE
PRODUCTS, INC.,

Plaintiff,

v.

DEANE YESU, DEBBIE PAPALLO, ROGER
ROTH and W.B. MASON COMPANY, INC.,

Defendants.

Civil Action No. 3:04 CV 0466 (CFD)

RULING ON PLAINTIFF'S APPLICATION FOR PRELIMINARY INJUNCTION

After an evidentiary hearing, the Court makes the following findings of fact and conclusions of law.

I. Findings of Fact

1. Plaintiff Corporate Express Office Products, Inc. ("Corporate Express") is a Delaware corporation with its principal place of business in Colorado. It is a national supplier of office products, office supplies, stationery, computer products, computer supplies, and furniture.

2. For many years, the three individual Defendants, Roger Roth, Debbie Papallo and Deane Yesu, were sales representatives for Corporate Express.¹ Papallo and Roth worked in that capacity for Corporate Express until March, 2003, when they resigned and went to work for Defendant W.B. Mason Company, Inc. ("W.B. Mason") as sales representatives. Yesu was promoted by Corporate Express to sales manager in 2001, but demoted back to sales

¹Only these three defendants were the subject of the instant motion.

representative in 2002. Yesu left Corporate Express in December 2003 to begin work as a sales representative for W. B. Mason.

3. Defendant W.B. Mason is also in the office products and furniture supply business. Its present market area is Massachusetts; Rhode Island; Connecticut; New Hampshire; Portland, Maine; Westchester, N.Y.; Manhattan; and New Jersey. W.B. Mason and Corporate Express are competitors in these markets.

4. In 2001, Papallo and Roth signed a one-page, standard form "Non-Competition and Confidentiality Agreement" (the "Agreement") with Corporate Express. Their Agreements contained a provision that prohibits them for one year after termination of their employment from working in a competitive business in "any territory where Employee worked during employment with the Company." Yesu signed a similar Agreement in 2001 that contained a provision that prohibits him from working in a competitive business in "any territory Employee managed during his/her employment with the Company." The Agreements also contained non-solicitation and confidentiality provisions.

5. The individual Defendants did not have assigned or exclusive territories when they signed these Agreements. Instead, they were free to sell and prospect for customers in any area they wished, as long as they "qualified their leads" to make sure another Corporate Express representative was not already servicing or calling on the prospect.

6. The first time that Corporate Express ever assigned "territories" to any of its sales representatives was in May of 2003, approximately two years after the individual Defendants had signed their Agreements. At that time, the Plaintiff assigned responsibility to Papallo and Roth

for calling on customers in certain towns, which Corporate Express called "prospecting territories."

7. At the time these "prospecting territories" were assigned to Roth and Papallo, no one from Corporate Express ever stated that these new "prospecting territories" would now become a part of the "territory" mentioned in their Non-Competition Agreements. Indeed, neither Papallo nor Roth were told that the assignment of these prospecting territories would have any impact on the Agreements they had signed with Corporate Express. Moreover, the assigned territories included towns that had little or no relationship to the actual areas "worked" or "to be worked" by Papallo and Roth.

8. Yesu was not assigned a "prospecting territory" in the spring of 2003 when these assignments were made with the sales representatives, such as Roth and Papallo.

9. The individual Defendants have, with a few insubstantial exceptions, not retained or used any Corporate Express documents or information after their departures, and have not disclosed any Corporate Express documents or information to W.B. Mason.

10. The Defendants have not used or disclosed to W.B. Mason any trade secret or confidential information of Corporate Express.

11. Since they became employed by W.B. Mason, the individual Defendants also have not called on any of their former clients or customers from Corporate Express.

12. Plaintiff has not established any significant sales it has lost or will lose as a result of the individual Defendants' activities on behalf of W.B. Mason.

13. The injunction requested by the Plaintiff would impose a substantial hardship on each of the individual Defendants. For example, there is no assurance that any of them would

have continued employment with W.B. Mason if they were not permitted to call upon the customers they are now calling upon. On the other hand, no significant harm has been caused to Corporate Express by the sales activities of these three defendants while with W. B. Mason.

14. Plaintiff has not established that there is any likelihood that, in the future, any of the individual Defendants will access any information obtained from Corporate Express or disclose it to W.B. Mason. Even if the information Corporate Express is concerned about were deemed truly confidential, or a trade secret, Plaintiff has shown no threat of future harm in this regard, upon which to base a request for preliminary injunctive relief.

II. Conclusions of Law

1. The Court has subject matter jurisdiction based on diversity of citizenship.
2. Connecticut substantive law applies. However, "[t]he question whether a preliminary injunction should be granted is generally one of federal law even in diversity actions, though state law issues are sometimes relevant to the decision to grant or deny." Baker's Aid v. Hussman, 830 F.2d 13, 15 (2d Cir. 1987).
3. "A preliminary injunction may be granted only when the party seeking the injunction establishes that (1) absent injunctive relief, it will suffer irreparable harm, and (2) either (a) that it is likely to succeed on the merits, or (b) that there are sufficiently serious questions going to the merits to make them a fair ground for litigation, and that the balance of hardships tips decidedly in favor of the moving party." Statharos v. N. Y. City Taxi & Limousine Comm'n, 198 F. 3d 317, 321 (2d Cir. 1999); Branson Ultrasonics v. Stratman, 921 F. Supp. 909, 913 (D. Conn. 1996).

4. In order to obtain a preliminary injunction, Plaintiff must demonstrate an actual and imminent threat of irreparable injury if the injunction is not granted. "Because a showing of probable irreparable harm is the single most important prerequisite for the issuance of a preliminary injunction, the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered. Irreparable harm must be shown by the moving party to be imminent and not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages." Reuters Ltd. v. United Press Intern., Inc., 903 F.2d 904, 907 (2d Cir. 1990).

5. Under Fed. R. Civ. P. 65, irreparable harm will not be presumed in a case such as this, but must be proven by the Plaintiff, even if there is contractual language declaring money damages inadequate. Baker's Aid v. Hussman Foodservice Company, 830 F.2d at 16.

6. Plaintiff has not shown any threat of immediate irreparable harm from disclosure of its trade secrets or confidential, proprietary information. The information to which the individual Defendants had access at Corporate Express concerning customers and pricing does not constitute trade secrets or confidential proprietary information.

7. Even if such information were to constitute trade secrets or confidential proprietary information, the individual Defendants did not take any such information with them when they left Corporate Express, have not disclosed such information to W.B. Mason and are not using such information in their work for W.B. Mason. Corporate Express is therefore not suffering any harm from the use of its information, much less irreparable harm.

8. In addition, Corporate Express has not shown any threat of immediate, irreparable harm to its goodwill. The individual Defendants are not calling on the customers they serviced at

Corporate Express, so whatever goodwill they may have had with their own, previously assigned customers while at Corporate Express is not being interfered with or affected.

9. The Agreement with Yesu, by its terms, does not apply to his work as a sales representative at Corporate Express, but only applied to his position as sales manager. Thus, it is unenforceable on that basis as well.

10. The territorial restrictions in the Agreements are unenforceable because it has not been demonstrated that the parties had a meeting of the minds as to what "territory" was to be covered by the restrictions or even how the prohibited "any territory . . . worked" was to be determined. The terms "any territory . . . worked" and "any territory . . . managed" are ambiguous and Plaintiff has presented no evidence -- parol or otherwise -- that would provide the Court with any reasoned way to construe the intent of the parties or limit the restriction to a defined geographic area.

11. If, on the other hand, the territorial restrictions covered the areas assigned in May, 2003, they would be unreasonable in scope (and hence unenforceable) under the five prong test applicable under Connecticut law. The geographic area covered by the restriction is excessive. See Robert S. Weiss & Assocs., Inc. v. Wiederlight, 208 Conn. 525, 529, n.2 (1988); Scott v. General Iron & Welding, 171 Conn. 132 (1976).

12. Corporate Express is not likely to succeed on the merits, and even if there were sufficiently serious questions going to the merits to make them a fair ground for litigation, the balance of hardships has not been shown by Corporate Express to tip decidedly in its favor. No loss has been demonstrated by defendants' conduct, and the enforcement of the territorial aspect

of the Agreements would likely result in either their termination by W.B. Mason or severe limitation in employment.

Accordingly, Plaintiff's Application for Preliminary Injunction [**Doc. #5**], is **DENIED**.

IT IS SO ORDERED.

Dated at Hartford, Connecticut this 17th day of February, 2005.

/s/ CFD
CHRISTOPHER F. DRONEY
UNITED STATES DISTRICT JUDGE